Supreme Court, U.S.
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NO. 80-445

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

CHARLES E. LIGONS, PETITIONER,

v.

BECHTEL POWER CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

THAT THE CIRCUIT COURT ERRED IN FINDING THAT THE EMPLOYER CARRIED ITS BURDEN OF PROOF IN REBUTTING THE EMPLOYEE'S PRIMA FACIE CASE OF DISCRIMINATION.

II

THAT THE CIRCUIT COURT ERRED IN NOT FINDING THE "OVERLOAD TECHNIQUE OF LAYOFFS" (i.e. CONTINUING TO HIRE NEW EMPLOYEES WHILE TERMINATING EXISTING EMPLOYEES) BY THE EMPLOYER WAS NOT DISCRIMINATORY.

III

THAT THE CIRCUIT COURT ERRED IN NOT REQUIRING THE EMPLOYER TO OFFER <u>ANY EVIDENCE</u> IN REBUTTING EMPLOYEE'S PRIMA FACIE CASE OF DISCRIMINATORY TERMINATION OF EMPLOYMENT AND HOW THE EMPLOYEE WAS SELECTED FOR TERMINATION.

IV

THAT THE CIRCUIT COURT ERRED IN INTERPRETING AND APPLYING THE BURDEN OF PROOF THAT THE EMPLOYER MUST MEET IN ORDER TO REBUT THE EMPLOYEE'S PRIMA FACIE CASE OF RACIALLY DISCRIMINATED TERMINATION FROM EMPLOYMENT.

V

THAT THE CIRCUIT COURT ERRED IN NOT FINDING THAT THE EMPLOYEE REBUTTED THE EMPLOYER'S PROFERRED JUSTIFICATIONS FOR TERMINATION OF EMPLOYMENT BY SHOWING THEY WERE PRETEXTUAL.

VI

THAT THERE IS A CONFLICT IN THE LOWER FEDERAL COURTS REGARDING THE BURDEN OF PROOF ON A DEFENDANT-EMPLOYER IN REBUTTING A PRIMA FACIE CASE OF DISCRIMINATION THAT SHOULD BE RESOLVED.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding.

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STATUTE

42 U.S.C. Section 2000e, Subsections 2(a) (1-2) and 2(h)

OPINIONS DELIVERED BELOW

The opinion of the United States District Court for the Northern District of Iowa is reported at _____F. Supp. _____ (N.D. Iowa, September 7, 1979). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at _____F. 2d _____ (8th Cir., June 16, 1980).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment entered on June 16, 1980, by the United States Court of Appeals for the Eighth Circuit, which decree affirmed an earlier judgment rendered by the United States District Court for the Northern District of Iowa and denied Petitioner's Appeal from said judgment. Petitioner relies upon the authority of this Court to review by certiorari any judgment of a United States Court of Appeals as set forth in 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The following federal statute is necessary to the resolution of the questions presented: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, Subsections 2(a) (1-2) and 2(h).

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The employee, Charles Ligons, filed a complaint with the EEOC on or about February 14, 1973, claiming discrimination amounting to unlawful employment practices committed by the Bechtel Power Corporation, in violation of 42 USC Section 2000(e)-2 and Section 1981. That the EEOC arranged a conciliation agreement for the payment by Bechtel Power Corporation to the employee in the amount of $7,002.00. That Bechtel Power Corporation withdrew from the agreement prior to its written execution. That a right to sue letter was issued to the employee on or about April 5, 1977. That a complaint was filed in the United States District Court for the Northern District of Iowa, Cedar Rapids Division, on or about June 8, 1977. That on or about July 11, 1977, the employer filed an answer claiming a defense of business

necessity in that employees were "laid off due to lack of work and the layoff was made in a non-discriminatory fashion and based upon ability to perform the work. Those persons who were retained at the time Plaintiff was laid off had exhibited a greater degree of competence for the performing of the work that remained to be done." The EEOC investigation found reasonable cause to believe the charge of employment discrimination was true. That trial was held on June 13, 1979. That a Findings of Fact and Conclusions of Law and Order were entered by the Court on September 7, 1979. That the Conclusions of Law found that "Plaintiff has made a prima facie showing of racial discrimination as to his claim of discriminatory application of testing procedures and discriminatory layoffs." The decision further found that Plaintiff's layoffs were non-discriminatory and born of business necessity and that the Plaintiff failed to

show by competent evidence that the Defendants proferred justifications in rebuttal are pretextual. No findings were made or evidence offered as to the method of selecting the employee for termination.

That the Eighth Circuit of Appeals decision on June 16, 1980 stated, "The employer as a Title VII Defendant need not 'prove absence of discriminatory motive to escape liability; a prima facie showing of disparate treatment shifts only the burden of producing evidence to the employer, not the burden of persuasion'.. Criteria for Ligons' initial layoff included qualifications, skill and productivity. Richard Alberts, a pipefitter and foreman, testified that only fitters less qualified, skilled and productive than Ligons were retained at the same time Ligons was first laid off. There is no evidence that welders less qualified, skilled or productive than Ligons with respect to the particular aspect of work

then required at Palo were retained."

STATEMENT OF FACTS

THAT THE EMPLOYER LAID OFF MR. LIGONS AT THE SAME TIME IT WAS HIRING PERSONS FOR HIS JOB. (Tr. 44, 151, 152)

That the Plaintiff, Charles Ligons, was the only black employee in his crew. (Tr. 29) There was a work force of 3 to 4 thousand for the Defendant at the Duane Arnold Energy Center atomic plant construction site in Palo, Iowa, with no evidence of other blacks employed. (Tr. 115, 154) That all supervisory personnel were Caucasian. (Tr. 100, 103) That Mr. Ligons had been a welder for 35 years. (Tr. 8)

That the employer's policy was that the selection of employees who would be laid off would be through the foreman, general foreman and then approved by the superintendent. That this was the general custom and practice in the trade and that in considering the same, the productivity,

skill and qualifications of the employees who are being laid off in relation to the people who are retained is considered. Those employees having a higher productivity, higher skill and qualifications would be retained and the lesser ones would be laid off. In a layoff in which the company is still hiring, the layoff involves less qualified people. In this case, if Mr. Ligons was more qualified than the people who were retained, he should not have been laid off. (Admitted by Lawrence Eugene Rosetta, superintendent of the Defendant-employer for the Palo job.) (Tr. 105-108)

The employer violated its own recommended practice and that established by the custom and practice in the trade by laying Charles Ligons off without consulting his foreman. (Tr. 110) His foreman never recommended that he be laid off and had no complaints about the work of Charles Ligons. (Tr. 33, 110, 112)

No evidence was offered by the employer as to how Ligons was selected for layoff or how others were retained. The foreman felt he had the skill and qualifications to do the welding job, and there were employees who were retained after the layoff in which Charles Ligons was terminated who were less qualified and not as productive as Charles Ligons. (Tr. 111, 151) On the particular job at Palo, the foremen were not consulted about layoffs and in particular, no one asked the foremen about recommendations as to whether or not Mr. Ligons should be laid off. The foreman thought Mr. Ligons was a good employee and good welder and that his layoff was unfair and his being black played a part in the layoff. (Tr. 112-115, 151-153)

THAT THE EMPLOYER CONTINUED TO HIRE WHEN IT LAID CFF MR. LIGONS (Tr. 44, 151, 152)

Charles Ligons was hired by the employer on or about September 21, 1971. He was residing in California prior to that time and saw a posted call for employment of welders in Palo, Iowa, by the employer. He called the employer and was advised if he passed an independent welding test at a laboratory in California he would be hired upon his arrival in Iowa. (Tr. 18) That Mr. Ligons took the examination at the independent laboratory in California and passed the same. (Tr. 18, 86, Plaintiff's Exhibit 1) That he worked for the employer until he was laid off on or about February 9, 1973. That he was rehired by the Defendant at the Palo, Iowa site on or about February 22, 1974. That Charles Ligons is a black United States citizen. (See stipulation in final pre-trial Order). He was not a member of the union. (Tr. 54)

That Charles E. Ligons is 54 years of age and an ordained minister of the Baptist Church, with a fulltime job as a

welder for Bechtel Power Corporation in Palo Verde, Arizona. That he has been a welder by occupation holding fulltime employment since on or about the year 1943. (Tr. 7, 8) He has been employed by the following companies: United States Navy Shipyards, Vancouver, Washington; Ford Motor Company, Richmond, California; Naval Shipyards, Hunters Point, California; Pacific Coast Shipyards, San Francisco, California; Bethlehem Steel Shipyards, San Francisco, California; Rainmaker Company, Stockton, California; Butane Tank Company, Los Angeles, California; Southwest Engineering Company, Los Angeles, California; that the same involved all types of welding experience. (Tr. 8-17) His experience at Southwest Engineering included supervision and inspection of welding and welding repairs to high pressure boilers used in nuclear reactors. That the boilers manufactured at Southwest Engineering Company, upon which Mr.

Ligons did welding, supervision and inspection of all welding and repairs, were the same type that were installed at the Duane Arnold Energy Center, Palo, Iowa, the site of the Bechtel Power Corporation employment in question in this lawsuit. (Tr. 15-17)

That all supervisory personnel at the Defendant's employment site at Palo, Iowa were Caucasian. (Tr. 100, 103, pre-trial stipulation) That in particular, Max Shows, chief inspector, and Billy Seals, general foreman, were Caucasians from Mississippi. That there was no secret as to these two supervisors' bias and prejudice towards members of the black race. (Tr. 47-49, 52, 155)

That after his employment, Mr. Ligons did general welding work and on or about February 9, 1973, he received a notice that he was being laid off pursuant to a general layoff. (Tr. 29) That although Mr. Ligons was advised that he was being

laid off as a resullt of the reduction in the work force, new men had been employed in his own crew within the last three days prior thereto and a standing call for welders and fitters was maintained at the union hall and on the day of the layoff additional employees were being hired. (Tr. 44, 151-152) That there were at least five new men hired in his crew alone within a space of a few days prior to the layoff. (Tr. 30-32) That one of the men hired and retained was in fact a fitter working as a helper with Charles Ligons. (Tr. 31) That Mr. Ligons had the greatest seniority in his crew and was one of the oldest employees of Bechtel Power Corporation in the welding field at the time of his layoff. (Tr. 30, 114) That none of the pipefitters in Mr. Ligons' crew were laid off. (Tr. 30)

That it is generally recognized that a welder is more qualified and skilled than a pipefitter, and that a welder can

do a fitter's job whereas a fitter cannot do a welder's job. (Tr. 31, 112, 116, 149) That many pipefitters were retained at the time of Mr. Ligons' layoff.

That the "overload technique" is sometimes used in construction projects to weed out those people whose employment they would like to terminate. (Tr. 44, 46, 108) That the technique in general involves a continuing hiring of employees for particular positions beyond the requirements of the job so that they can then pick and choose other employees for purposes of layoff. (Tr. 44, 151, 152)

That upon Mr. Ligons' being rehired by Bechtel Power Corporation as a welder, it was necessary for him to be retested in all phases of welding as a result of not being employed during the interim period and his certifications having expired. (Tr. 193-4) That certification by testing of welders is generally effective for a 90-day period, unless the welder is

performing welds in his employment. If the welder is employed performing welds, it is not necessary for him to be retested after the 90-day period. If he is not performing such welds, a test certification is necessar-. (Tr. 42, 43) The retest was a direct result of his being laid off previously and not performing welding for Bechtel Corporation during the period of layoff. (Tr. 50, 56) Moreover, Mr. Ligons was employed as a welder during part of the interim by a different employer. (Tr. 33)

That upon Mr. Ligons being rehired, he was tested by J. D. Pierce, a Caucasian from Mississippi. (Tr. 184) That Mr. Pierce's qualifications involved on-the-job training and he did not have any formal technical, college or advanced school technique. (Tr. 194, 195) That Mr. Ligons was tested several times by Mr. Pierce and that Tester Pierce failed to pass him concerning several tests that he had previously

taken and passed successfully. (Tr. 192, 193) That Mr. Ligons did pass a test as a general welder not involving advanced techniques. He was then placed in the fabrication shop.

That pursuant to a general layoff for a "reduction in work force", Mr. Ligons was laid off on or about February 24, 1974. (Tr. 39) That at the time of his layoff on the second occasion, he was working in a 20-25 man crew and was advised by the shop foreman that the layoffs were to be made on a strict seniority basis. That one half of the employees kept were fitters. (Tr. 41) That six people were laid off at this time and Mr. Ligons had been there the longest of those six. (Tr. 39, 47-49, 52, 155) However, those retained in Mr. Ligons' crew had been there for a longer period of time than he had. (Tr. 40) Due to the necessity of additional testing, and the failure of Mr. Pierce to pass Mr. Ligons on his tests,

his qualifications as far as test qualifications were concerned were not necessarily inferior to any of those individuals retained. (Tr. 50, 56, 64, 175) The employer was still hiring at the time of this second layoff. (Tr. 44, 46)

That there was a general attitude of dislike for members of the black race amongst the employer's personnel. That crass jokes and signs were posted regularly with racial slurs. That supervisory personnel told racial jokes even in front of Mr. Ligons. (Tr. 47, 48, 49, 52)

That during Mr. Ligons' time as a welder for the Bechtel Power Corporation at the Duane Arnold Energy Center, Palo, Iowa site, he did not at any time have any welds that were performed while he was on the job rejected. (Tr. 162) That the foreman who worked with Mr. Ligons on a daily basis considered him to be a good employee, very productive, with the

necessary skills and qualifications to be a good welder. None of his foremen at any time recommended that he be laid off. In fact, if they had been asked for their recommendation, they would have recommended the retention of Mr. Ligons as an employee. (Tr. 115, 116, 150, 151)

That it was not unusual for a welder to be tested periodically and that many welders occasionally failed to pass welding tests. (Tr. 172, 195, Defendant's Ex. J, H) The list of welders not passing tests during the time that Mr. Ligons was employed at the Duane Arnold Energy Center involved over 300 men. (Ibid.) That in fact, at the maximum peak of employment, only 300-350 welders were employed by Bechtel Power Corporation at the Palo site. (Tr. 171, 172, Defendant's Ex. J, H)

That the EEOG report, Plaintiff's Exhibit 10, notes that the representatives of the Defendant agreed to a conciliation

agreement and payment to the Plaintiff in the amount of $7,002.00. However, before the same could be completed in writing, and executed by all parties, they withdrew from the agreement. (See Plaintiff's Exhibit 10, page 5.) That the EEOG report finds that the Defendant failed and refused to produce evidence to document its contentions of a business necessity, and failed to show any evidence of the Plaintiff's inability, lack of skill or productivity. (See page 17 Plaintiff's Exhibit 10). That no evidence was offered by the employer as to Ligons' comparative ability, skill and productivity as compared to those employees retained. The EEOG report notes that foreman Alberts stated to the investigator that Charles Ligons was a quality welder, a good employee and that the did not know why the Plaintiff was not promoted. (See page 19, Plaintiff's Exhibit 10.)

In regard to the testing of the Plaintiff by the Defendant, the following took place: Prior to his arrival in Palo, Iowa, the Plaintiff was tested by Advance Testing Laboratories, Inc., an independent laboratory in Los Angeles, California, where he passed a test for heliarc advanced welding technique. (Tr. 18, 86, Plaintiff's Ex. 63) After being employed by the Defendant on or about September 21, 1971, the Plaintiff took his first welding test on or about October 4, 1971, and failed a heliarc welding test which was identical to that which had been previously given by the independent laboratory which he had passed. (Tr. 13, 63) The next test he was given at or about that time he passed, allowing him to do plate welding, and he was sent back into the field. (Tr. 136) That on or about January 12, 1972, the Plaintiff took his fourth test and passed an advanced heliarc welding test. (Tr. 73) That the next

test the Plaintiff took was on or about August 21, 1972, in which he passed a heliarc pipe welding examination. (Tr. 75) That of the five tests taken by the Plaintiff during this time, and before his first layoff, he failed one and passed four.

That after the first layoff and the Plaintiff's rehiring by the Defendant, he was retested for his welding skills on or about October 24, 1973, October 26, 1973, and again shortly thereafter. He failed the heliarc pipe welding test he had previously passed on October 24 and October 26, but did pass a stick welding test for plate welding. (Tr. 148)

That all welders belong to pipefitters unions, as do fitters. (Tr. 148, 149) That it is generally recognized that a welder can perform a pipefitter's job whereas a pipefitter cannot necessarily perform a welder's job; however, they all

belong to the same union. (Tr. 148, 149) The union card that both carry is identically the same.

It was not unusual for a welder to fail a test; a number of welders failed welding tests. That at the peak time of employment for the Defendant approximately 350 welders were employed. That the evidence shows most of them failed welding tests at times. (Tr. 171, 172, 173, Defendant's Exhibit J + 1)

The Plaintiff is presently employed as a welder by the Defendant in Arizona, and his qualifications as a welder there are not questioned. (Tr. 178)

That the Defendant-employer merely stated its layoffs were due to business necessity but offered no explanation as to why it continued to hire and no reasons as to why Ligons was selected for termination. The Circuit Court construed the employer's evidence that a layoff of 58

other employees at the same time as Ligons as sufficient explanation for his termination and did not deal with the question of business necessity as to the particular selection of Ligons.

The only evidence offered as to skill, qualifications and production, the admitted criteria for termination of an employee, was that offered by the Plaintiff-employee. That no rebuttal of the employee's prima facie case of discrimination as to him individually was offered by the employer.

That the trial court's finding of a "McDonnell Douglas" prima facie showing of discrimination as interpreted by Furnco Construction Corp. v. Waters et al, 438 U.S. 567 (1979), would require an explanation of the precise act of discrimination (i.e. the personal selection of the employee for termination).

That there is a conflict in the decisions in the lower federal courts as to

the burden of proof of an employer under the circumstances of this case that requires resolution.

See, e.g., "Argument for Granting Certiorari", infra.

ARGUMENT FOR GRANTING CERTIORARI

It is respectfully submitted that the issues herein revolve around the question of the burden of proof of an employer after an employee has established a prima facie case of discrimination. There is doubt as to the precise legal standard to be applied. Further, in this case there is the additional question of precisely what is the point of inquiry. In our case the Court concentrated on the business necessity of a layoff, rather than the reason that the individual employee was selected for that layoff. There is not one scintilla of evidence to justify selecting Ligons as an employee to be

included in the layoff. All evidence is to the contrary - that he should have been retained, based on the employer's own standards. Further, the employer's "overload technique" of laying off employees while they continued to hire employees to fill the same positions should in and of itself be held to be discriminatory.

The lower federal courts are in disarray in their interpretations of the applicable standards by which a defendant must rebut a prima facie showing of discrimination. See, e.g., Johnson v. Olin Corp., 484 F. Supp. 577, 581 (S.D. Texas 1980) (to "articulate" a legitimate business purpose means to "prove" by a preponderance of the evidence); Jones v. Trailways Corp., 477 F. Supp. 642, 647 (D. D.C. 1979) (once discrimination has been found, defendant can prevail only by clear and convincing proof that same action would

have been taken even absent discriminatory motive); Kirby v. Colony Furniture Co., 613 F. 2d 696, n. 6 at 705 (8th Cir. 1980) (proper standard for proving "business necessity" is compelling need for challenged practice and no alternative practice available); Sweeney v. Board of Trustees of Keene College, 604 F. 2d 106, 108 (1st Cir. 1979) (where defendant articulars a facially valid business practice, plaintiff may prove by a preponderance of the evidence that stated practice is pretext); Turner v. Texas Instruments, Inc., 555 F. 2d 1251, 1255 (after prima facie showing is made, defendant must prove legitimate business purpose by preponderance of evidence).

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA

CEDAR RAPIDS DIVISION

CHARLES E. LIGONS,	)	No. C 77-41
	)	
Plaintiff	)	FINDINGS OF
	)	
vs.	)	FACT, CONCLU-
	)	
BECHTEL POWER CORPORATION,	)	SIONS OF LAW
	)	
Defendant	)	AND ORDER

This employment discrimination case was tried to the Court on June 13, 1979. All proposed findings and conclusions having been received, the Court now makes the following findings of fact, conclusions of law and order granting judgment for Defendant.

In this action brought pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 USC Section 2000e et. seq.,[1]

[1]Plaintiff's complaint also asserted claims pursuant to 42 USC Section 1981, 1985 and 1986, which were dismissed by previous order

of court. See Order, Ligons v. Bechtel Power Corp., No. C 77-41 (N. D. Iowa, December 20, 1977).

Defendant denies the charge of discrimination and asserts affirmatively that its testing and layoffs of Plaintiff were pursuant to legitimate non-discriminatory business practices and necessities.

At the outset, the Court notes that the issues raised in the case as brought by Plaintiff are rather limited. For example, Plaintiff does not challenge the validity of Defendant's testing procedures; and he does not claim, nor has he attempted to show, that Defendant's testing and layoff practices had a statistically disparate effect on blacks as a racial group. His claim hinges specifically on his limited contention that these employment practices were racially discriminatory as applied to him individually. Compare, e.g., E.E.O.C. Guideline, 29 C.F.R. 1607.11 (1978). Thus, as so presented, the case involves the following issues: (1) was Plaintiff denied

opportunities to upgrade his welding qualifications because of his race; (2) were Defendant's testing procedures for upgrading welder's qualifications racially discriminatory as applied to Plaintiff individually; and (3) were Defendant's layoff procedures racially discriminatory as applied to Plaintiff individually?

It is with this view of the issues raised that the Court makes its decision.

FINDINGS OF FACT

1. Plaintiff is a black citizen of the United States, and at all times material was Defendant's employee, working as a welder at Defendant's Duane Arnold Energy Center construction site in Palo, Iowa (Palo project).

2. Defendant is a corporation engaged in the business of constructing nuclear power plants, which is in an industry affecting interstate commerce. At all times

material, Defendant has had 25 or more employees for each working day for each of 20 or more calendar weeks.

3. Plaintiff has complied with all relevant administrative procedure prerequisites to a civil action.

4. It was Defendant's employment requirement that all welders at its Palo project be qualified in accordance with the welding-qualification standards of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, Section IX (1971 ed.). This ASME code sets forth objective criteria for testing welders on various types of welding work.

5. As applied at Defendant's Palo project, welding tests are divided into two basic classifications: P1-A-LH and P1-AT-LH. The "P1-A-LH" qualification permits a welder to perform only general

welding jobs. The "P1-AT-LH" qualification permits a welder to pe-form the more difficult "heli-arc" welding jobs. There exists no evidence indicating that welders at the Palo project were renumerated dif ferently based on this two-part qualifications classification.

6. On September 21, 1971, Plaintiff was hired by Defendant to work as a welder at its Palo project, having previously passed a P1-AT-LH "heli-arc" welding test administered by Advanced Testing Laboratories, Inc. of Los Angeles, California, in accordance with the ASME Section IX Code. Passing this test was a prerequisite to employment as a welder at the Palo project.

7. Under Defendant's welder testing and layoff procedures, decisions to allow a welder to test to maintain and upgrade his qualifications or be laid off were made by "project crew" supervisory personnel.

8. Some of Plaintiff's "project crew" supervisors expressed, in other matters, a predisiposition towards discrimination against members of the black race by telling "nigger jokes" and making other derrogatory comments about blacks.

9. Between September 21, 1971, and February 9, 1973, Plaintiff was qualified to perform P1-AT-LH welding. During this period he was often tested for purposes of maintaining his qualifications. In applying tests, Defendant did not racially discriminate among its welding employees.

10. On February 9, 1973, Plaintiff and 58 other white employees were laid off subject to re-hire, for reasons of business necessity and in furtherance of a general reduction in force. There is no evidence

that any of the welders[2] retained on the job was less qualified than Plaintiff.

11. On September 24, 1973, Plaintiff was re-hired by Defendant as a welder at the Palo project.

[2]In the pipefitter trade generally and as it operated at Defendant's Palo project, there exists two classifications: welder and fitter. It is generally recognized that a welder is qualified to do a fitter's job, but that a fitter is not qualified to do a welder's job. Pipefitter hiring and layoffs at the Palo project were pursuant to this welder-fitter categorization, as required by Defendant's agreement with the pipefitter union. Under that agreement a person seeking employment as a welder at the Palo project had to proceed through the Union hiring hall in Des Moines, Iowa. For employment as a fitter, a person had to proceed through the Cedar Rapids, Iowa Union hall. No transfers between the welder and fitter categories were made at the job site. A person desiring such transfer had to proceed through the respective union hiring halls. Plaintiff does not challenge this procedure. Therefore, the Court does not decide whether such procedures are inherently discriminatory. Thus, although the evidence does indicate that at the time of Plaintiff's February 1973 layoff fitters were retained on the Palo job site, this fact is not material to Plaintiff's claim that he was discriminatorily laid off in spite of his asserted qualifications as a welder.

12. At the time of re-hire, and because of his prior layoff, Plaintiff had to be requalified for Pl-AT-LH welding. He failed his initial Pl-AT-LH test, but passed a Pl-A-LH test. There is no evidence that those who tested Plaintiff at this time had any predisposition towards discrimination against members of the black race. In applying these tests Defendant did not racially discriminate among its welding employees.

13. Between September 24, 1973, and February 24, 1974, when he was laid off a second time, Plaintiff failed tests to re-test his welding qualifications.

14. On February 24, 1974, Plaintiff was again laid off, subject to re-hire, for reasons of business necessity and in furtherance of a general reduction in force. There is no evidence that at the time of the second layoff, any of the welders[3]

[3] See footnote 2, supra.

retained on the job was less qualified than Plaintiff.

15. In June 1977, Plaintiff was re-hired by Defendant to work as a welder at its construction site at Palos Verde, Arizona. At time of trial, Plaintiff was still working for Defendant as a welder at the Arizona site.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and of the parties. 42 USC Section 2000e-5(f)(3).

2. Defendant is an "employer" within the meaning of 42 USC Section 2000e(b).

3. Plaintiff has failed to make a prima facie showing that Defendant denied him opportunities to re-test his welding qualifications.

4. Plaintiff has made a prima facie showing of racial discrimination as to his claim of discriminatory application of

testing procedures and discriminatory lay-offs. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, Pettit v. United States, 488 F. 2d 1026, 1033 (Ct. Claims 1973). Compare Lumas v. Commercial Cartage Co., No. 79-1009, Slip op. at p. 4 (8th Cir., August 17, 1979); Baxter v. Savannah Sugar Refining Corp., 495 F. 2d 437, 444 (5th Cir. 1974); Thompson v. McConnell Douglas Corp., 416 F. Supp. 972 (E.D. Mo. 1976), aff'd 552 F. 2d 220 (8th Cir. 1977); Taylor v. Safeway Stores, Inc., 365 F. Supp. 468 (D. Colo. 1973). See also Lowry v. Whitaker Cable Corp., 348 F. Supp. 202 (W.D. Mo. 1972). aff'd 472 F. 2d 1210 (8th Cir. 1973).

5. Defendant has rebutted Plaintiff's prima facie case of discrimination by a preponderance of the evidence showing that its testing procedures for upgrading of welders' qualifications had a manifest relationship to the welding jobs for which

they were used, see Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); that their application to Plaintiff individually was not racially motivated or otherwise discriminatory on the basis of race, Thompson v. McDonnell Douglas Corp., supra, 416 F. Supp. at 982; and that Plaintiff's layoffs were not actuated by racial considerations but rather were based on valid non-discriminatory evaluations of Plaintiff's qualifications and borne of business necessity in furtherance of a legitimate reduction in force, see Thompson v. McDonnell Douglas Corp., supra, 416 F. Supp. at 982; compare Lumas v. Commercial Cartage Corp., supra, Slip Op. at pp. 4-5; Mopkins v. St. Louis Die Casting Corp., 423 F. Supp. 132, 135 (E.D. Mo. 1976), aff'd 569 F. 2d 454 (8th Cir. 1978).

6. Plaintiff has failed to show by competent evidence that Defendant's

proferred justifications in rebuttal are pretextual.[4] See Green v. McDonnell Douglas Corp., 390 F. Supp. 501 (E.D. Mo. 1975) (on remand from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), aff'd 528 F. 2d 1102 (8th Cir. 1976). Compare Lumas v. Commercial Cartage Corp., supra, Slip Op. at p. 6.

It is therefore

ORDERED

The Clerk of Court shall enter judgment in favor of Defendant.

September 7, 1979.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

[4]With respect to the issue of pretext in relation to Defendant's layoff practices, Plaintiff's proffered evidence relating to Defendant's alleged use of a so-called "overload technique" is insufficient to find that Defendant in fact used such technique. Nor is it sufficient, even assuming its use by Defendant, to conclude that it operated to bring white welders less qualified

than Plaintiff onto the Palo project during the times that Plaintiff was laid off, or that its use operated to bring in white welders to fill the welding positions left vacant by Plaintiff's layoffs.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1848

CHARLES E. LIGONS,	*	APPEAL FROM
	*	
Appellant,	*	THE UNITED
	*	
v.	*	STATES DISTRICT
	*	
BECHTEL POWER CORPORATION,	*	COURT FOR THE
	*	
Appellee.	*	NORTHERN DIS-
		TRICT OF IOWA

Submitted: April 14, 1980

Filed: June 16, 1980

Before LAY, Chief Judge, ROSS, Circuit Judge, and LARSON, Distridt Judge.*

ROSS, Circuit Judge

Charles E. Ligons appeals from a judgment of the district court[1] rejecting

his claims brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.[2] In that action Ligons alleged that his employer, Bechtel Power Corporation, had discriminated against him on the basis of race in its employment testing and layoff practices.

[*] The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1] The Honorable Edward J. McManus, Chief Judge of the United States District Court for the Northern District of Iowa.

[2] Claims brought by Ligons pursuant to 42 U.S.C. Sections 1981, 1985 and 1986, previously dismissed by the district court, Ligons v. Bechtel Power Corp., No. C 77-41 (N.D. Iowa, December 20, 1977), are not the subject of this appeal.

Following a hearing, the district court denied Ligons' claim, finding that Bechtel had rebutted Ligons' prima facie case of disparate treatment and that Ligons had failed to establish by competent evidence that Bechtel's proferred justifications were a mere pretext for racial discrimination. We affirm.

Ligons, a black, was first employed by Bechtel in September of 1971 as a welder at the Iowa Electric Light and Power Duane Arnold Energy Center construction site at Palo, Iowa. To meet its contractual obligations with Iowa Electric, Bechtel required that its welders be qualified in accordance with standards of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME), Section IX (1971 ed.). That Code prescribes objective criteria for testing welders on various types of welding work

and for placing them in two general categories: (1) P1-A-LH, under which a welder qualifies to perform general welding jobs, and (2) P1-AT-LH, involving more difficult welding procedures. Prior to his arrival at Palo, Iowa, Ligons passed a test which qualified him under P1-AT-LH to perform heliarc welding. During his first week of employment, however, Ligons was required to report to the test shop for training and testing as a result of observations made by a welding engineer, of a weld which Ligons had improperly prepared. Following a one-week training period, Ligons passed a simple plate welding test, but failed the same heliarc welding test which he had passed before coming to Palo. Ligons spent several weeks on at least three separate occasions training for upgrading and testing to assure his competence to perform various

types of welds.

On February 9, 1973, Ligons was laid off along with 58 other pipefitter-welders, all of whom were white. Ligons was informed that he was eligible for rehire when more welders were needed, the layoff being the result of a general reduction in work force on the Palo project.

When rehired by Bechtel as a welder on the Palo project in September of 1973, Ligons required further training and testing for recertification. After approximately one month of training, Ligons qualified only to perform plate welding, the least difficult type of welding. On February 22, 1974, Ligons was one of six welders laid off, again as a result of a reduction in the work force, this reduction being based strictly on seniority.

From these facts, the district court determined that Ligons made a prima facie showing of disparate treatment under

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), with respect to his claims of discriminatory application of testing procedures and layoffs, but not as to his claim that he was denied opportunities to upgrade his welding qualifications.

Ligons' prima facie showing of disparate treatment shifted the burden to the company to prove that its manner of testing and layoffs of Ligons were based on "a legitimate consideration, and not an illegitimate one such as race * * *. To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's (treatment)'." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978), citing McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 802.

After considering Bechtel's rebuttal evidence, the district court found legitimate reasons for justifying the testing and layoffs of Ligons. Specifically, the court found that

> (d)efendant has rebutted plaintiff's prima facie case of discrimination by a preponderance of the evidence showing that its testing procedures for upgrading of welders' qualifications had a manifest relationship to the welding jobs for which they were used, see Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); that their application to plaintiff individually was not racially motivated or otherwise discriminatory on the basis of race, Thompson v. McDonnell Douglas Corp., supra, 416 F. Supp. at 982; and that plaintiff's layoffs were not actuated by racial considerations but rather were based on valid non-discriminatory evaluations of plaintiff's qualifications and borne of business necessity in furtherance of a legitimate reduction in force, see Thompson v. McDonnell Douglas Corp., supra, 416 F. Supp. at 982; compare Lumas v. Commercial Cartage Corp., supra, Slip Op. at pp. 4-5; Mopkins v. St. Louis Die Casting Corp., 423 F. Supp. 132, 135 (E.D. Mo. 1976), aff'd, 569 F. 2d 454 (8th Cir. 1978).

In his suit and on this appeal Ligons alleges that Bechtel failed to establish that race was not a motivating factor in

the decision to lay him off. Appellant misconceives the nature of the burden imposed on a Title VII litigant alleging disparate treatment. The employer as a Title VII defendant need not "prove absence of discriminatory motive to escape liabvility; a prima facie showing of disparate treatment shifts only the burden of producing evidence to the employer, not the burden of persuasion." Kirby v. Colony Furniture Co., 613 F. 2d 696, 702 (8th Cir. 1980); Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). See also Vaughn v. Westinghouse Electric Corp., No. 79-1561, slip op. at 8 (8th Cir. April 23, 1980).

Bechtel clearly met this burden of production. It established that the layoffs were due to business necessity and in furtherance of a legitimate reduction in the work force.

The evidence established that personnel requirements fluctuated as the project progressed. In light of the variance in work force, Ligons admitted that layoffs were anticipated. He also stated that he knew there would be a general reduction in the work force because the project was "winding down." Indeed, the fact that 58 other pipefitter-welders, all white, were also laid off at the time of Ligons' initial layoff clearly rebuts any inference of discriminatory animus against Ligons.

Criteria for Ligons' initial layoff included qualifications, skill and productivity. Richard Alberts, a pipefitter and foreman, testified that only fitters less qualified, skilled and productive than Ligons were retained at the same time Ligons was first laid off.

There is no evidence that welders[3]

[3]Since Ligons was not hired as a pipefitter, and made no attempt to reclassify as

such, the district court was correct in rejecting his contentions as to discrimination based on the retention of pipefitters when welders were laid off.

As the district court noted:

> In the pipefitter trade generally and as it operated at defendant's Palo project, there exists two classifications: welder and fitter. It is generally recognized that a welder is qualified to do a fitter's job, but that a fitter is not qualified to do a welder's job. Pipefitter hiring and layoffs at the Palo project were pursuant to this welder-fitter categorization, as required by defendant's agreement with the pipefitter union. Under that agreement a person seeking employment as a welder at the Palo project had to proceed through the Union hiring hall in Des Moines, Iowa. For employment as a fitter, a person had to proceed through the Cedar Rapids, Iowa Union hall. No transfers between the welder and fitter categories were made at the job site. A person desiring such transfer had to proceed through the respective union hiring halls. Plaintiff does not challenge this procedure. Therefore, the court does not decide whether such procedures are inherently discriminatory.
>
> Thus, although the evidence does indicate that at the time of plaintiff's February, 1973 layoff fitters were retained on the Palo job site, this fact is not material to plaintiff's claim that he was discriminatorily laid off in spite of his asserted qualifications as a welder.

Ligons v. Bechtel Power Corp., No. C 77-41, slip op. at 4 (N.D. Iowa Sept. 7, 1979).

less qualified, skilled or productive than Ligons with respect to the particular aspect of work then required at Palo were retained. Indeed, one welding engineer testified that to his knowledge, no other employee with Ligons' qualifications spent as much time upgrading or taking tests from September of 1971 to February of 1973 as Ligons.

Nor is there evidence to suggest that the welding tests given Ligons were discriminatorily applied so as to prevent Ligons' certification for the more difficult welding procedures. In evidence is an exhibit which demonstrates only that other welders sometimes failed the tests. In addition, Joseph Antriking testified that he took a job as a fitter because <u>everyone</u> was having difficulty passing the tests.

The tests were based on objective welding standards set by the American

Society of Mechanical Engineers. Bechtel was contractually bound to insure that its welders were qualified under, and that all welding performed on the job complied with, these standards.

Ligons' assertion that, contrary to typical procedure in the welding industry, his foreman did not assess his qualifications and never recommended that he be laid off, is without merit. Joseph Antriking, a pipefitter and foreman at the time of Ligons' first layoff, testified that at this particular job, the foremen were never consulted about layoffs. Instead, Billy Seals, a craft superintendent who frequented the job site observing the welders' work, made the recommendations as to which welders to lay off.

Ligons does not challenge the company's use of seniority in determining that he be laid off in February of 1974. At the time of his second layoff, he

was performing the less sophisticated, plate welding techniques.

In view of our finding that the first layoff was legitimate, we must conclude that the second layoff was also nondiscriminatory, since Ligons' lack of seniority at the time of that layoff was a direct result of his being laid off initially. We agree with the district court's determination that the company effectively rebutted Ligons' prima facie showing off disparate treatment in both its testing and layoffs of Ligons, as well as its determination that the testing procedures for upgrading welder's qualifications had a manifest relationship to the welding jobs for which they were used.

Those determinations did not end the district court's inquiry. As mandated by McDonnell Douglas, supra, 411 U.S. at 804, Ligons was given an opportunity to introduce evidence that Bechtel's proffered

justifications for the layoffs and his failures at welding tests were a mere pretext for racial discrimination.[4]

[4]In his brief, Ligons claimed that Richard Alberts "stated that Ligons had the skill and qualifications necessary for welding jobs and that there were employees who were retained by the Defendant who had less qualified skills and productivity than Mr. Ligons did at the time of his first layoff." The record discloses that Mr. Alberts, a fitter, served as Charles Ligons' foreman from approximately September 14, 1973 (when Ligons was rehired by Bechtel) to January 15, 1974 (one month prior to his second layoff). Mr. Alberts testified that in his opinion Ligons had the skill and qualifications to properly perform his welding tasks. His testimony, however, was that fitters were the only employees retained after the second layoff--a layoff based strictly on seniority--who had less qualified skills and productivity than Ligons. As noted previously, fitters and welders were separately classified at Palo. See note 3, supra.

Ligons also claimed that Joseph Antriking, a pipefitter and foreman, "testified that there were people who maintained their employment after Ligons' layoff who were less qualified, with fewer skills and less productivity than Mr. Ligons." Mr. Antriking did testify to that effect. But he also testified that he and Ligons were working in different areas of this rather extensive project at the time of Ligons' first layoff, and that he was unfamiliar with and therefore, unable to directly compare, the skills of the other employees in Ligons' crew. Antriking had worked with Ligons more than one year prior to Ligons' initial layoff for a period of only two months. When asked why he opposed

Despite his efforts to establish that the welding tests were discriminatorily applied and that the layoffs were unwarranted, the district court concluded that Ligons failed to show by competent evidence that Bechtel's proffered justifications for Ligons' treatment were pretextual.

Our careful review of the record convinces us that the district court's findings are not clearly erroneous. FED. R. CIV. P. 52(a). Contrary to Ligons' assertions, the record does not support a finding that Bechtel continued to hire welders at the time of Ligons' layoffs or shortly before or thereafter, or that Bechtel employed an "overload"technique or other procedure whereby it hired beyond its needs for the purpose of reducing its work force in a discriminatory manner. Rather, it

Ligons' layoff, Antriking responded that he felt that no one should be laid off unless the job was finished. The district court considered the testimony of these witnesses insufficient to establish that Bechtel's proffered justifications for the layoffs were pretextual.

appears from the record that Ligons received much assistance and instruction from the company in maintaining and upgrading his qualifications and that he was laid off in accordance with Bechtel's typical policies at this job site based on a legitimate need to reduce the work force.

The judgment of the district court is affirmed. Each party shall pay its own costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES CODE

TITLE 42 -- THE PUBLIC HEALTH AND WELFARE

Section 2000(e) - 2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer --

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

* * * * * * * * * * * * * * * * * * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful practice for any employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin...

PROOF OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing instrument were served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in (an) envelope(s) addressed to each at his respective address, as disclosed by the pleadings herein, with first-class postage fully paid, and by depositing same in a United States Post Office depository in Cedar Rapids, Iowa, on the 15th day of September, 1980.

Lloyd E. Humphreys

Lloyd E. Humphreys

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